ALOR JANGGUS SOON SENG TRADING SDN BHD & ORS

v.

SEY HOE SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD NOOR AHMAD JCA
ABDUL AZIZ MOHAMAD J
[CIVIL APPLICATION NO: P-02-34-1997]
6 AUGUST 2002

CIVIL PROCEDURE: *Judge - Recusal from hearing - Trial - Dismissal of appeal by quorum including judge in question on preliminary objections - Appeal reinstated and remitted to Court of Appeal - Whether judge to recuse himself - Bias - Test for real danger of bias - Whether satisfied - Whether an adverse decision a ground for disqualification - Whether application for recusal to be granted*

The appellants ('the applicants') submitted that his lordship Denis Ong JCA formed a quorum ('the first quorum') in an earlier hearing where their appeal had been dismissed based on preliminary objections ('the said hearing') raised by the respondents. The Federal Court then reinstated their appeal and the matter was remitted to the Court of Appeal. The learned judge formed the quorum ('the second quorum') which was to hear the said appeal.

The applicants applied, by way of motion, to this court for the recusal of the learned judge from hearing their appeal. They claimed that as the learned judge formed the first quorum which handed an adverse decision to them, there was a real danger of the learned judge being biased by the outcome of the said hearing and therefore would possibly be unable to decide the current appeal fairly.

Held:

Per Denis Ong JCA

[1] The test for apparent bias was the real danger of bias test as settled in *R v. Gough*. Four salient points are to be noted in that it applies to all cases of apparent bias; it calls for an ascertainment of the relevant circumstances of the case in establishing the existence of factors which may give rise to a real danger of bias; the "court" personifies the reasonable man; and the expression "real danger" is preferred to "real likelihood" to ensure that the court is thinking in terms of possibility rather than probability of bias. (pp 275 b, d-e & f)

[2] The issues decided in the said hearing by the first quorum and the substantive issues to be determined by the second quorum in the appeal were clearly different in nature and in subject matter. Consequently, the decision on the preliminary objections was irrelevant to any future determination of the issues in the substantive appeal. (p 277 h)

[3] In the English case of *Locabail (UK) v. Bayfield Properties*, it was observed that ordinarily an objection for recusal is not soundly based on a judge's previous decisions. Further, the fact that a comment or finding is adverse to a party would not, without more, found a sustainable objection. (p 278 a-b)

[4] The allegation of bias, according to the applicants, was not based on the judgment of court in the said hearing but on the fact of adverse decision of dismissal of the substantive appeal by the first quorum. More specifically, it was aimed at the learned judge who formed that quorum. However, a decision that is adverse to a party is not *per se* ordinarily a ground to disqualify a judge. (p 280 b & e)

[5] The objection of the applicants was without substance. There was no ground for the ordinary, reasonable and well-informed member of the public to assume that the issues in the substantive appeal would not be decided by an impartial or unprejudiced mind. Neither was there any reason for the applicants to doubt that they would receive a fair hearing before the second quorum. (p 281 f)

Per Mohd Noor JCA

[1] The applicants' notion, that there was a real danger of bias on the part of the learned judge having knowledge of the relevant facts thereby compromising the possibility of a fair trial, was only fit for the consumption of the ignorant and unreasonable bystander. Accordingly, the applicants' application should be dismissed. (p 282 b & d)

Per Abdul Aziz J

[1] In deciding on the preliminary objection, the panel, which included Denis Ong JCA, had not considered the merits. No fair-minded and informed bystander who knew of the circumstances would have entertained a fear that the learned judge might be biased when considering the merits of the appeal. (p 285 d-e)

[Application disallowed with costs.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu-perayu ('pemohon-pemohon') berhujah bawah Yang Arif Denis Ong HMR adalah sebahagian daripada satu kuorum ('kuorum pertama tersebut') dalam satu pembicaraan yang lebih awal di mana rayuan mereka telah ditolak berdasarkan bantahan-bantahan awal ('pembicaraan tersebut') yang dibangkitkan oleh responden-responden. Mahkamah Persekutuan kemudiannya telah menghidupkan semula rayuan mereka dan perkara tersebut telah dikemukakan semula kepada Mahkamah Rayuan. Hakim yang bijaksana telah membentuk kuorum tersebut ('kuorum kedua tersebut') yang mana sepatutnya mendengar rayuan tersebut.

Pemohon-pemohon telah memohon, melalui usul, kepada mahkamah ini bagi penarikan diri hakim yang bijaksana untuk mendengar rayuan mereka. Mereka menuntut bahawa oleh kerana hakim yang bijaksana tersebut membentuk kuorum pertama yang telah menyerahkan satu keputusan yang bertentangan kepada mereka, maka terdapat bahaya sebenarnya mengenai hakim bijaksana tersebut terpengaruh akibat pembicaraan tersebut dan dengan itu berkemungkinan tidak dapat untuk memutuskan rayuan semasa dengan adilnya.

Diputuskan:
Oleh Denis Ong HMR

[1] Ujian untuk sikap berat sebelah yang nyata adalah bahaya sebenar ujian sikap berat sebelah sepertimana yang ditetapkan dalam *R v. Gough*. Empat perkara utama haruslah diperhatikan iaitu ianya terpakai bagi kesemua kes-kes bersikap berat sebelah nyata; ianya meminta kepastian keadaan-keadaan relevan kes tersebut dalam menentukan kewujudan faktor-faktor yang boleh membangkitkan bahaya sebenar sikap berat sebelah; "mahkamah" menjelmakan orang yang wajar; dan ungkapan "bahaya sebenar" lebih mengutamakan "kemungkinan sebenarnya" bagi memastikan bahawa mahkamah berfikir menurut kemungkinan daripada kebarangkalian akan sikap berat sebelah.

[2] Isu-isu yang diputuskan dalam pembicaraan tersebut oleh kuorum pertama dan isu-isu substantif yang harus ditentukan oleh kuorum kedua dalam rayuan adalah jelas berlainan menurut sifat dan dalam hal perkara. Akibatnya, keputusan atas bantahan-bantahan awal adalah tidak relevan kepada mana-mana penentuan yang akan datang akan isu-isu dalam rayuan substantif tersebut.

[3] Dalam kes *Locabail (UK) v. Bayfield Properties*, telah diperhatikan bahawa secara lazimnya sesuatu bantahan untuk penarikan diri adalah secara kukuhnya tidak berasaskan pada keputusan-keputusan terdahulu hakim. Selanjutnya, fakta bahawa sesuatu ulasan atau keputusan adalah bertentangan kepada sebuah pihak tidak akan, tanpa lebih daripada itu, menjadi asas bagi suatu bantahan yang boleh dipertahankan.

[4] Dakwaan berat sebelah menurut pemohon-pemohon, bukannya diasaskan pada penghakiman mahkamah dalam pembicaraan tersebut tetapi atas fakta keputusan penolakan bertentangan akan rayuan substantif oleh kuorum pertama. Lebih khusus lagi, ianya telah ditujukan kepada hakim yang bijaksana yang telah membentuk kuorum itu. Walaubagaimana pun, sesuatu keputusan yang bertentangan kepada sesuatu pihak adalah tidak *per se* secara lazimnya suatu alasan untuk menjadikan seseorang hakim tidak layak.

[5] Bantahan pemohon-pemohon adalah tanpa substans. Tidak terdapat alasan untuk orang awam yang wajar, biasa dan yang telah dimaklumkan untuk menjangkakan bahawa isu-isu di dalam rayuan substantif itu tidak akan diputuskan oleh daya pemikiran yang saksama dan tidak prejudis. Tidak juga terdapat sebarang alasan untuk pemohon-pemohon meragui bahawa mereka akan menerima suatu pembicaraan yang adil daripada kuorum kedua.

Oleh Mohd Noor HMR

[1] Tanggapan pemohon, bahawa terdapat bahaya sebenar berat sebelah di pihak hakim bijaksana dengan mempunyai pengetahuan fakta-fakta yang relevan dan dengan itu menjejaskan kemungkinan suatu perbicaraan yang adil, hanya sesuai untuk pemakaian mereka yang jahil dan tidak berfikiran munasabah. Oleh yang demikian, permohonan pemohon seharusnya ditolak.

Oleh Abdul Aziz H

[1] Dalam memutuskan bantahan awal, ahli panel, termasuk Denis Ong HMR, telah tidak menimbangkan merit-meritnya. Penonton (by-stander) yang berfikiran adil dan mempunyai pengetahuan mengenai keadaan-keadaan tersebut tidak akan melayan kebimbangan bahawa hakim yang bijaksana mungkin bersikap berat sebelah ketika mempertimbangkan merit-merit rayuan tersebut.

Permohonan ditolak dengan kos.]

Case(s) referred to:

Allied Capital Sdn Bhd v. Mohamed Latiff Shah Mohd & Another Application [2001] 2 CLJ 253 ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [2000] 2 CLJ 473 ***(refd)***

Foss v. Harbottle [1843] 2 Hare 461 ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin [1995] 2 CLJ 900 ***(refd)***

Locabail (UK) v. Bayfield Properties [2002] 3 LRC 482 ***(foll)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(foll)***

Mohamed Ezam Mohd Nor & Ors v. Ketua Polis Negara [2001] 4 CLJ 701 ***(foll)***

Re JRL, ex p CJL [1986] 161 CLR 342 ***(refd)***

Reg v. Gough [1993] AC 646 ***(foll)***

For the appellants - Dato' VK Lingam (R Thayalan & YS Leong); M/s Lye Poh Kham & Assoc

For the 1st respondent - Tan Lip Gay; M/s Leong, Ng & Tan

For the 2nd respondent - Dato' Ghazi Ishak; M/s Ghazi & Lim

For the 3rd respondent - RJ Manecksha; M/s Ong & Manecksha

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-109-93]

Reported by M Maheswaran

JUDGMENT

Denis Ong JCA:

By a notice of motion dd. 7/5/02 supported by an affidavit of Lim Tee Keng, the 2nd appellant/applicant herein (hereafter referred to as "the said affidavit"), affirmed on the same date on behalf of all six appellants/applicants (hereafter referred to collectively as "the applicants"), the applicants applied to the court for the recusal of a certain member of the quorum namely, Denis Ong Jiew Fook JCA from hearing and determining all further proceedings in appeal no: P02-34-97 between the applicants and the respondents named above.

The motion and the appeal proper were fixed by the registry for hearing in the appointed sitting of the Court of Appeal in Kuala Lumpur for the week commencing on 6 May 2002 and before a quorum of three judges, namely, Denis Ong Jiew Fook JCA (that is myself), Hj. Mohd Noor bin Hj. Ahmad JCA and Abdul Aziz bin Mohamad FCJ (hereafter referred to as "the second quorum"). The motion was in fact heard on 8 May 2002 and was disallowed with costs to the respondents to be taxed.

Hearing of the appeal proper was adjourned to a date to be fixed. At the time of pronouncing our unanimous decision I also intimated that the grounds of our decision in writing would be given later. I do so now.

The events or circumstances relied upon for the recusal application are stated in grounds 14, 15, 18, 19 and repeated in paras. 4(24), (25), (33), 5, 6 and 8 of the said affidavit.

They may be summarised thus:

(1) that on 9 November 1999 in another quorum of three judges of the Court of Appeal, (hereafter referred to as "the first quorum") I had, with Siti Norma Yaakob and Haidar Mohd. Noor JJCA, notwithstanding the applicants' submission that the hearing of the appeal should not proceed without the sanction of the official assignee:

(a) refused on oral application by the applicants' counsel for an adjournment of the hearing of the appeal fixed for that day; and

(b) dismissed the applicants' appeal based on the preliminary objections raised by the 1st respondent.

(2) That such dismissal was decided by the first quorum of which I was a member and that decision was a decision adverse to the applicants albeit on preliminary objections.

(3) That in the light of (1) and (2) above, although no actual bias was alleged by the applicants, an impartial, reasonable and fair minded bystander with knowledge of the relevant facts would perceive that there was a real danger of bias that a fair hearing of the applicants' appeal before the second quorum of which I am also a member would no longer be possible however much I may judiciously strive to avoid it;

(4) My recusal would ensure complete impartiality of the Court of Appeal without any real danger of bias and preserve the integrity and sanctity of the applicants' appeal.

The respondent did not file any affidavit. At the outset of their submissions Mr. Tan Lip Gay and Dato' Ghazi Ishak learned counsel for the first and second respondents respectively indicated that they had no objection that I sit as a member of the second quorum to hear the appeal proper. The attention of the court was drawn by Dato' V.K. Lingam to a letter dd. 5.7.01 from the legal firm of M/s. Ong & Manecksha addressed to the deputy registrar, Court of Appeal and copied to M/s. Lye Poh Kam & Associates solicitors for the applicants, M/s. Leong Ng & Tan solicitors for the first respondent and

M/s. Ghazi & Lim solicitors for the second respondent, in which my name was listed together with three other judges' as having previously dealt with the instant appeal. Mr. R.J. Manecksha learned counsel for the third respondent acknowledged that such letter issued from his firm but disclaimed authorship. He apologised for having named me in such letter when I did not hear the appeal.

What is the appropriate response upon a request made to the second quorum by the applicants for my recusal?

In *Locabail (UK) v. Bayfield Properties* [2002] 3 LRC 482 Lord Bingham CJ delivering the judgment of the English Court of Appeal referred to three categories of cases giving rise to recusal applications and how they should be dealt with by the judge concerned. He said:

> (21) In any case giving rise to automatic disqualification on the authority of *Dimes* and *Ex p Pinochet (no 2)*, the judge should recuse himself from the case before any objection is raised. The same should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with the last minute choice between adjournment and waiver of an otherwise valid objection. If in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance.

In the absence of any allegation of actual bias or personal embarrassment against me hearing the appeal, automatic disqualification was a non-issue. The allegation of the applicants was confined solely to one of apparent bias.

The situation which confronted the second quorum seemed to come under the third category of Lord Bingham CJ and the question was that, having regard to events (1)(a) and (b) mentioned before, was this a right and proper case for me to stand down from the second quorum. That, following what Lord Bingham CJ said, was a matter for the second quorum (more particularly for me) to consider and exercise our judgment with reference to the particular objection of the applicants.

The test of apparent bias applied in our courts was decisively settled by the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65 per Edgar Joseph Jr. FCJ and consistently adhered to in *Allied Capital Sdn. Bhd. v. Mohamed Latiff bin Shah Mohd and Another Application* [2001] 2 CLJ 253 at p. 259 per Mohtar Abdullah FCJ and in *Mohamed Ezam bin Mohd Nor & Ors. v. Ketua Polis Negara* [2001] 4 CLJ 701 per Mohamed Dzaiddin CJ. That test was the real danger of bias test settled by the House of Lords in *Reg. v. Gough (H.L.(E))* [1993] AC 646 at p. 670F per Lord Goff of Chieveley which so far as is relevant is expressed in terms as follows:

> Accordingly, having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him, ...

Lord Goff of Chieveley made four points concerning that test namely:

(a) it applies to all cases of apparent bias;

(b) it calls for an ascertainment of the relevant circumstances of the case;

(c) the "court" there personifies the reasonable man; and,

(d) the expression "real danger" is preferred to "real likelihood" to ensure that the court is thinking in terms of possibility rather than probability of bias.

According to Lord Bingham CJ in *Locabail* [2002] 3 LRC 482 at p. 497 para. (25c) the purpose of ascertaining the circumstances in point (b) is to see if there are any factors which may give rise to a real danger of bias. Everything depends on the facts which may include the nature of the issue to be decided and he gives instances in general terms by way of contrasts to illustrate his point. He expresses the view that ordinarily an objection could not soundly be based on a judge's previous judicial decisions but thinks otherwise in para. 25f-h:

> ... or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such a person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind ... or, if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.

However, he considers in para. 25h that:

> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.

On point (c) he states in para. 17d-e that the approach to take is one that is:

> ... based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public.

so that the courts will ensure both that justice is done and that it is perceived by the public to be done.

Applying the test in *Gough* to the present appeal and taking into account of the fact that the second quorum has yet to hear the appeal proper, the test might appropriately be formulated thus:

Having regard to the events or circumstances mentioned, and the reasons for the decision stated in the judgment of the court, would it appear to the ordinary, reasonable and well-informed member of the public that there is a real possibility of bias by reason of prejudgment or prejudice on the part of Denis Ong Jiew Fook JCA to hear the appeal proper in the sense that he might unfairly regard with disfavour the case of the applicants who are parties to the issues in the appeal which issues are to be considered by him in the second quorum.

With reference to the test, Lord Bingham CJ observed in para. 25i-a:

> In most cases, we think, the answer one way or the other will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat every application must be decided on the facts and circumstances of the individual case. The greater that passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

The first question to ask is what were the issues to be considered in the appeal proper. For the record, neither the first quorum nor the second quorum in fact heard the substantive appeal although fixed for hearing before them on 9 November 1999 and 8 May 2002 respectively. The proceedings on 9 November 1999 was terminated abruptly upon the first quorum upholding the preliminary objections of the 1st respondent and dismissing the appeal. Hearing of the substantive appeal on 8 May 2002 was adjourned to a date to be fixed after disallowance of the motion for recusal and upon application by the applicants.

From a perusal of the appeal record, it is clear that the subject matter of the appeal concerned an agreement in writing dd. 1.9.92 between the 1st respondent and the 3rd respondent for the sale and purchase of 682,500 shares of MGR Corp. Sdn. Bhd. From the memorandum of appeal and the outline submission of the applicants, the applicants intended to raise three issues in the appeal for the decision of the second quorum. They were:

(1) whether the agreement was null and void for various reasons;

(2) alternatively, whether the agreement was terminated by virtue of breaches of its terms; and,

(3) whether the appellants had the *locus standi* to bring the action against the respondents in the first place under the rule in *Foss v. Harbottle* [1843] 2 Hare 461.

The main question for the decision of the first quorum on 9 November 1999 was whether this appeal no: P02-34-97 was properly brought, based on two preliminary objections raised by Mr. Tan Lip Gay, namely:

(a) only the draft order was in the appeal record but not the sealed order; and,

(b) no chronology of events had been submitted to the registrar of the Court of Appeal.

The first quorum upheld both objections and decided as a matter of law that the appeal was not properly brought before it and consequently dismissed such appeal with costs. The judgment of the court was delivered by Haidar JCA (as he then was) and was reported in [2000] 2 CLJ 473. That was the judgment which the applicants identified as an "adverse decision" against them albeit on preliminary objections – adverse in the sense that the outcome of such judgment was a dismissal of the substantive appeal. (See para. 4(25) of the said affidavit). Whether adverse decision is a ground of disqualification of a judge and the particular objection of the applicants are matters to be dealt with in a moment.

It will be observed that the issues decided by the first quorum on 9 November 1999 and those to be determined by the second quorum on 8 May 2002 are clearly different in nature and in subject matter. There is nothing in common between them. In short, they bear no relation to one another whatsoever. Consequently, the decision on the preliminary objections is irrelevant to any future determination of the issues in the substantive appeal.

I come now to the matter of whether an adverse decision is a ground of disqualification of a judge and the particular objection of the applicants. Lord Bingham CJ observed in *Locabail* in para. 25d that ordinarily an objection for recusal is not soundly based on a judge's previous judicial decisions. He further observed in para. 25h quoted above that the fact that a comment or finding is adverse to a party would not, without more, found a sustainable objection.

On the same point Mason J in *Re J.R.L., Ex parte CJL* [1986] 161 CLR 342 (HC) at p. 352 observed, with reference to the reasonable apprehension of bias test accepted in Australia, as follows:

> It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as Watson (27) and Livesey (28) has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. **It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party.** There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. **In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established":** *Reg. v. Commonwealth and Arbitration Commission; Ex parte Angliss Group* (29); *Watson* (30); *Re Lusink; Ex parte Shaw* (31). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

Such observation of Mason J is equally relevant in the context of the real danger of bias test in Malaysia.

The particular ground of objection of the applicants is stated in paras. 4(25) and 5 of the said affidavit which are reproduced below:

4.(25). The Learned Judges of the Court of Appeal in allowing the preliminary objections raised by the 1st Respondent, dismissed the Applicants/Appellants' Appeal herein with costs and the deposit is to account for the taxed costs. The decision of the Court of Appeal in dismissing the Applicants/Appellants Appeal herein based on the preliminary objections raised by the 1st Respondent was an adverse decision made against the Applicants/Appellants.

A copy of the Judgment of the Court of Appeal reported as *Alor Janggus Soon Seng Trading Sdn. Bhd. & Ors v. Sey Hoe Sdn. Bhd. & Ors* [2000] 2 CLJ 473 is annexed herewith and marked as Exhibit "LTK-14".

5. I have been advised by the applicants/appellants solicitors and verily believe such advice to be true that on the principle that justice must not only be done but also be seen to be done, an impartial and reasonable and fair minded bystander with knowledge of the relevant facts, in the light of the adverse decision made on 9.11.1999 against the Applicants/Appellants by the panel of the Court of Appeal comprising of Her Ladyship Justice Dato' Siti Norma bte Yaakob, His Lordship Justice Dato' Haidar bin Mohd. Noor and His Lordship Justice Datuk Denis Ong Jiew Fook, albeit on preliminary objections as stated in paragraphs 4(24) and 4(25) above, there is a real danger of bias that a fair hearing of the Applicants/ Appellants' Appeal herein before His Lordship Justice Datuk Denis Ong Jiew Fook will no longer be possible however much His Lordship Datuk Denis Ong Jiew Fook may judiciously strive to avoid it. For the avoidance of doubt, I unequivocally state that the Applicants/Appellants are not alleging any actual bias on the part of His Lordship Justice Datuk Denis Ong Jiew Fook.

It should be plain and obvious to the informed objective bystander that in the face of such preliminary objections persisted by the respondents, a determination had to be made on 9 November 1999 by the first quorum on such objections. Either they were upheld or not. Such a decision was bound to be for one party and against the other. It could not be for or against both parties. If it were for the respondents as it turned out to be so, then it must result in a dismissal of the substantive appeal. To the respondents, such dismissal was a favourable decision but to the applicants, it was an adverse decision. On the flip side, that was to say, if the first quorum were to decide those objections against the respondents, then it must result in a dismissal of their objections and also entail the actual hearing of the appeal on 9 November 1999 or at some future date to be fixed. To the respondents that would also be regarded as an adverse decision. But to the applicants it would be a favourable one.

From what has just been said it must be equally obvious that whether a decision is favourable or adverse depends upon by whom it is perceived ie, by the respondents or by the applicants. Where it is favourable to one party, there would be no application for recusal for sure; but where it is adverse to the other party there might be, as in the case of the applicants here. Surely, a decision that is adverse to a party is not *per se* ordinarily a ground to disqualify a judge as observed by Lord Bingham CJ and Mason J above. As stated in para. 4(25) of the said affidavit, the basis for saying that the decision of the first quorum was adverse was the dismissal of the substantive appeal. But that dismissal was not without its grounds or reasons which were stated in the judgment of the court. They addressed the issues raised by those preliminary objections which as observed earlier in this judgment were dissimilar in nature and irrelevant to the issues in the substantive appeal. There is no way that those issues decided in the preliminary objections will ever again arise or be resurrected or become live or contentious issues at the hearing of the substantive appeal and consequently, no way could it be said by the informed objective bystander that the first quorum was infected by prejudgment or prejudice if it were to hear and determine the substantive appeal. The judgment of the court delivered by Haidar JCA was written in plain and not emotive language. There were no remarks or comments for or against any party. On any reading of that judgment, the bystander could only have concluded that it was sober, objective and impartial.

However, the allegation of bias according to the applicants was not based on the judgment of the court but on the fact of adverse decision of dismissal of the substantive appeal by the first quorum. More specifically, such allegation was targeted at me for my part in the decision-making process by virtue of the fact that I was part and parcel of the first quorum.

Paragraph 5 of the said affidavit which makes such allegation, speaks a mouthful in the first of two sentences. It is long, unwieldy, and somewhat unclear and incomplete, apparently because of the omission of certain words and the lack of particulars of the allegation. So far as I can make sense out of it, the complaint is general, the gist of which is that notwithstanding my best efforts, I will fail in my judicial duty to put such adverse decision of dismissal out of my mind so that it will be a foregone conclusion that ultimately the substantive appeal would also be dismissed. In short, the applicants seem to allege that the danger of bias in me is so real that I am as good as actually biased although in the second sentence they are quick to disclaim any such allegation.

My legal response to that allegation is to repeat what Mason J observed in *Re J.R.L., Ex parte CJL* which was quoted above:

> There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established": ...

And in the case of the applicants, pre-judgment has not been established by them.

On the factual aspect, let me say here and openly that to me this appeal is no different from any other although to the applicants it is of great importance. Equally to me, the parties to this appeal are treated no differently from any other litigant who have filed through my court over the years. In this regard I repeat what I said in open court on 8 May 2002 that I do not profess to know any of the applicants or the respondents at all. I have no interest in the subject-matter of the appeal nor have I any reason to be concerned with the outcome of the appeal. That was the position before and still is today. The fact that I sat in the first quorum and will sit again in the second quorum is not of my making; it is a matter entirely out of my hands.

In the premises I conclude that the objection of the applicants is without substance. There is no ground for the ordinary, reasonable and well-informed member of the public to suppose that I might not bring an impartial and unprejudiced mind to bear on the issues in the substantive appeal. Neither is there any reason for the applicants to doubt that they would receive a fair hearing before me in the second quorum. Thus, in my judgment this was not a right and proper case for me to abdicate my judicial function and to stand down from the second quorum upon the request of the applicants. As Edgar Joseph Jr. FCJ stated in *Majlis Perbandaran Pulau Pinang* at p. 129, the reason for the preference of the real danger of bias test was to "avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias".

For all these reasons stated, I disallowed the motion with costs to the respondents to be taxed. It was further ordered that hearing of the appeal proper be adjourned to a date to be fixed.

Mohd Noor Ahmad JCA:

I have had the advantage of reading in draft the judgment of my learned brothers, who have expansively considered the issues on this application. The application was based simply on the fact that Denis Ong JCA was involved in the decision-making process by a quorum which made the decision adverse to the applicants on a preliminary objection, wherein no argument on the merits of the substantive appeal was advanced. The applicants claimed that while not alleging any actual bias on the part of Denis Ong JCA but an impartial and reasonable and fair-minded bystander with knowledge of the relevant facts would think that there is a real danger of bias that a fair hearing before him will no longer be possible however much he may judiciously strive to avoid it. Hence, they relied on the principle that justice must not only be done but must also be seen to be done. With due respect, to my mind, such notion is only fit for the consumption of the ignorant and unreasonable bystander. I am in complete agreement that, for the reasons my learned brothers have given the application should be dismissed. It would therefore be mere supererogation for me to furnish a lengthy judgment of my own.

Abdul Aziz Mohamad J:

This was the appellants' application for an order that my learned brother, Denis Ong JCA, be at liberty "to recuse himself from hearing and determining all further proceedings in the appeal herein". He was the presiding judge in the panel of this court that was to hear the appeal on 6 May 2002. On that day, the appellants' counsel orally raised the appellants' objection to my learned brother's hearing the appeal but was asked to file a formal application for disqualification, and the hearing of the appeal did not proceed. The application was duly filed, and was heard on 8 May 2002.

It is necessary to set out certain previous events that the appellants adverted to in support of their application.

The appellants' appeal was from the dismissal by the High Court on 31 January 1997 of their suit in which they claimed that a share-sale agreement between the first and third respondents was invalid and therefore sought certain necessary reliefs. The dismissal of the suit meant that an order of injunction that the appellants had obtained to restrain the disposal of the shares ceased to have effect, but on the appellants' application this court, on 24 February 1997, after hearing all parties, made an order restraining the first and third respondents from dealing with or disposing of the shares until disposal of the appellants' appeal to this court. Mokhtar Sidin JCA was one of the panel that heard the appellants' application.

On 9 November 1999, when the appeal came on for hearing, the first respondent's counsel raised a preliminary objection on the grounds that the sealed order of the High Court was not in the record of appeal and no chronology of events had been served on the respondents' solicitors. This court allowed the preliminary objection and dismissed the appeal without hearing its merits. Denis Ong JCA was one of the panel that heard and ruled on the preliminary objection.

On 16 May 2000 the Federal Court allowed the appellants' appeal from the dismissal of their appeal and remitted the appeal to this court for determination.

The appeal was fixed to be heard on 19 April 2001 before a panel in which Mokhtar Sidin JCA was the presiding judge.

On 17 April 2001, two days before the appeal was to be heard, the second respondent's solicitors wrote to the deputy registrar to request him to bring to the attention of the panel the fact that Mokhtar Sidin JCA was one of the panel that, on 24 February 1997, "telahpun mendengar perbicaraan permohonan dan merit kes tersebut". To my mind, what the second respondent's solicitors meant by those words was that the panel of 24 February 1997, before deciding on that day to grant the injunction pending appeal, had necessarily to look at the merits of the case, at least to the extent necessary for determining that the appeal was not doomed to failure. The second respondent's solicitors ended their letter with a request that the hearing of the appeal be adjourned to another day, saying that the solicitors for the first and third respondents supported their application.

No reason was expressly given for the request for adjournment, but to my mind the second respondent's solicitors must have meant that the hearing of the appeal on 19 April 2001 ought to be adjourned because Mokhtar Sidin JCA ought not to sit on the panel, having considered the merits of the appeal to the extent that I have mentioned. The request implied that to the second respondent's solicitors Mokhtar Sidin JCA ought not to hear the appeal.

Next day, on 18 April 2001, the third respondent's solicitors wrote to the Chief Justice, the Chief Judge of Malaya and the deputy registrar to express their support for the request for adjournment of the second respondent's solicitors, which they said, correctly in my view, was on the ground that Mokhtar Sidin JCA had heard the merits of the case. The letter also implied that to the third respondent's solicitors Mokhtar Sidin JCA ought not to hear the appeal.

Consequently, when the appeal came on for hearing on 19 April 2001, Mokhtar Sidin JCA disqualified himself from hearing the appeal and adjourned the hearing to a date to be fixed.

The hearing of the appeal was fixed for 16 July 2001, but by letter dated 3 July 2001 the deputy registrar informed the parties that the hearing was postponed.

On 5 July 2001 the third respondent's solicitors wrote to the deputy registrar in response to the deputy registrar's letter of 3 July 2001, to give the names of judges of this court and of the High Court that had heard the case, which included Mokhtar Sidin JCA and Denis Ong JCA, and to ask for an early date of hearing before a panel that did not include those judges. The letter implied that to the third respondent's solicitors, Denis Ong JCA ought not to hear the appeal.

As I said, the appeal came on for hearing on 6 May 2002, when the appellants raised their objection to Denis Ong JCA's hearing the appeal. None of the respondents had any objection then to Denis Ong JCA's hearing the appeal. I think I ought to say straight away that I was of the view that the fact that the third respondent's solicitors had earlier, as indicated by their letter dated 5 July 2001, considered that Denis Ong JCA ought not to hear the appeal was irrelevant to the present application and did not preclude the third respondent from withholding his support for the present application.

The appellants' reasons for contending that Denis Ong JCA ought not to hear the appeal were primarily stated in para. 5 of their affidavit in support of their application. They relied on the principle that justice must not only be done but must also be seen to be done. Relying on that principle, while "not alleging any actual bias" on the part of Denis Ong JCA, they said that "an impartial and reasonable and fair-minded bystander with knowledge of the relevant facts" would think that "there is a real danger of bias that a fair hearing ... before (Denis Ong JCA) will no longer be possible however much (Denis Ong JCA) may judiciously strive to avoid it". The "relevant facts" that the appellants cited was the fact that Denis Ong JCA was on the panel that made the decision on 7 November 1999 to dismiss the appeal, a decision adverse to the appellants, on a preliminary objection.

As was apparent from the submission of the appellants' counsel, that reason was advanced in reliance on the following statement of NH Chan JCA in *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin* [1995] 2 CLJ 900 at p. 911:

> To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

The appellants in para. 5 of their affidavit were in effect saying that even though the dismissal of the appeal was on purely technical or procedural grounds, and even though, therefore, Denis Ong JCA had not considered the merits of the appeal or formed any idea in his mind as to the merits of the appeal, an impartial, reasonable and fair-minded bystander who knew of those circumstances, would nevertheless, simply because the appeal was dismissed, fear that when Denis Ong JCA heard the appeal on its merits he would not be able to keep his deliberations free from bias even though he tried his best to do so. But the appellants did not say by what process of thinking the fair-minded and informed bystander would entertain a fear of bias from those circumstances. Knowing that Denis Ong JCA had not been involved in the merits of the appeal, what would make the fair-minded bystander fear that he might be biased when he came to consider the merits? Rather it is, I thought, the ignorant and unreasonable bystander who would entertain such a fear. It is not so much the fact that a decision adverse to the appellants, that is the dismissal of their appeal, had been made that is important. What is important is the fact that in making that decision the panel, including Denis Ong JCA, had not considered the merits. No reasonable bystander who knows of the circumstances would fear that Denis Ong JCA might be affected by bias when he comes to consider the merits. There was, in my view, simply no circumstance to cause a fair-minded and informed bystander to entertain a fear of real danger of bias. I was, therefore, of opinion that the application should be dismissed.

I have taken the trouble to set out facts showing that the respondents' solicitors considered that Mokhtar Sidin JCA ought not to sit on the panel that was to hear the appeal on 19 April 2001 and that on that date Mokhtar Sidin JCA disqualified himself. What of those facts? The appellants in their affidavit did not expressly cite those facts as forming part of facts which would make the fair-minded and informed bystander fear a real danger of bias. It was only in the submission of their counsel that those facts were employed. He said, if I have taken it down correctly, that a reasonable bystander having knowledge of the stand of the respondents' solicitors about Mokhtar Sidin JCA and of the fact that Denis Ong JCA sat on the appeal when it was dismissed on a preliminary objection, would apprehend a real danger of bias. In my opinion, the stand of the respondents' solicitors as regards Mokhtar Sidin J, and Mokhtar Sidin J's decision to disqualify himself, whether the reason for that stand and for that decision was that Mokhtar Sidin J had looked at the merits of the appeal or otherwise, had no relevance whatsoever to the question of the fair-minded and informed bystander's perception of the likelihood of bias on the part of Denis Ong JCA.